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# Law of international telecommunication in the United States

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Law and Economics of International  
Telecommunications

Under the Auspices of the  
Max Planck Institute for Foreign and  
International Private Law  
edited by Ernst-Joachim Mestmäcker

Volume 4

Prof. Stephen R. Barnett  
Prof. Michael Botein  
Prof. Eli M. Noam

## Law of International Telecommunications in the United States



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## Editor's Preface

This book on the »Law of International Telecommunications in the United States« is part of an ongoing research project on the international communications system undertaken at the Max Planck Institute for Foreign and International Private Law in Hamburg. Like similar reports on other countries, this report is based upon questionnaires prepared at the Institute and reproduced at the end of the volume. The questionnaires are identical for all countries in order to facilitate comparative evaluations of the national reports. They serve as guidelines without, however, interfering with the authors' individual judgment in adapting their presentation to the special national situation. The project will include comparative analyses of key problem areas and the examination of the role of international organizations, the task of which is the facilitation of international communications.

The Max Planck Institute is most grateful for the cooperation of Professors Stephen R. Barnett, Michael Botein and Eli M. Noam. Professor Barnett, A.B., 1957, LL.B., 1962, Harvard University, is a professor of law at the University of California, Berkeley. Professor Botein, B.A., 1966, Wesleyan University; J.D., 1969, Cornell University; LL.M., 1972, J.S.D., 1979, Columbia University, is a professor of law at the New York Law School. Professor Noam, A.B., 1970, A.M., 1970, J.D., 1975, Ph.D., 1975, Harvard University, is director of the Center for Telecommunications and Information Studies at the Columbia University Graduate School of Business.

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## Introduction

Inspired by Lockean principles of natural law, classic American ideology seeks individualism, fragmentation of private power, limitation of government (with the notable exception of guaranteeing physical security) and protection of property rights and contracts. As applied to communications policy, this philosophy has justified a governmental role that is far narrower than in most other countries and has based government's residual role largely on the grounds of market failure and national security.

Market failure exists when the traditional competitive mechanisms for limiting economic power cannot operate, due to the peculiarities of an industry. In the case of telecommunications, these peculiarities include: the absence of property rights in the electromagnetic spectrum; the natural-monopoly characteristics often found in telecommunications networks; and the public-good externalities of universal service.

Until the mid-1970s, these were the fundamental goals of U.S. telecommunications policy. More recent trends, however, have shifted them in two contradictory directions. On the one hand, many of the market-failure arguments have been discarded as either inherently flawed or obsolete through technological change and entrepreneurial initiative. On the other hand, national-security arguments have become more important to U.S. policy makers.

For many other Western countries, however, the trends have been the opposite. National security concerns now have a lower priority, while a government's role in telecommunications often has become the foundation for industrial policy in the electronics field.<sup>1</sup>

There have been other divergences. U.S. efforts to protect individual privacy have been applied vigorously against the state but not as against private parties. The U.S. Constitution only occasionally applies.<sup>2</sup> Protections are mostly by adaptation of the common law or by heterogeneous state legislation dealing with specific abuses.<sup>3</sup> Many other Western countries reverse these priorities; they are vigilant about private power and often more tolerant of government authority.

The United States thus has diverged from European countries recently in

1 E.g., S. NORA & A. MINC, *L'INFORMATISATION DE LA SOCIÉTÉ* (1978).

2 E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

3 E.g., A. WESTIN, *PRIVACY AND FREEDOM* (1967).